

International Union of Operating Engineers Local 825, A,B,C,D,R,RH and Walters and Lambert Mason Contractors, Inc. and Laborers International Union of North America, Local No. 17. Case 3-CD-610

September 30, 1992

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed April 16, 1992,¹ by the Employer, alleging that the Respondent, International Union of Operating Engineers Local 825, A,B,C,D,R,RH, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers International Union of North America, Local No. 17. The hearing was held May 19, before Hearing Officer Alfred M. Norek. The Employer filed a posthearing brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Walters and Lambert Mason Contractors, Inc. (WLMC), is a New York corporation engaged in mason contracting. It annually purchases and receives goods and materials valued in excess of \$50,000 from points located outside the State of New York. During that same time, WLMC received gross revenues in excess of \$250,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers Local 825 and Laborers Local 17 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

WLMC is a masonry subcontractor currently under contract with U. W. Marx, a general contractor in charge of a construction project at Ulster County Community College in New Paltz, New York. The subcontract calls for WLMC to perform the brickwork for the construction project.

WLMC is a member of the Construction Contractors Association of the Hudson Valley, Inc. and the Mason Contractors Association of America (MCAA). The MCAA has collective-bargaining agreements with the Bricklayers and Allied Craftsmen, and the Laborers International Unions. WLMC has agreed to be bound by those agreements. WLMC is also a signatory to local agreements with the Hudson Valley District Council of Bricklayers and Allied Craftsmen, and Laborers Local 17.

In 1989, WLMC had a single project agreement with Operating Engineers Local 825, covering work to be performed outside of the geographic jurisdiction of Laborers Local 17. By letter dated May 1, 1990, WLMC stated that it did not wish to renew the contract. The contract expired on June 30, 1990, and has not been renewed.

Michael Walters, vice president of WLMC, testified that on April 9, WLMC received a truss boom forklift attachment at the Ulster County site. A member of Operating Engineers Local 825, present when the truss boom attachment was delivered, asked Walters about the purpose of the attachment and whether he planned to use an operating engineer to run the machine. Walters replied that the truss boom would be used to lift and move stones, and that the work belonged to laborers.

On April 13, Henry Bunce, the business representative for Local 825, visited the Ulster County site and told Walters that once the truss boom was attached to the forklift, the work belonged to operating engineers. Bunce also said that the Laborers and Operating Engineers had reached a voluntary agreement that operating engineers would run the forklift if it was operated more than 4 hours per day. Bunce then, according to Walters, stated that Local 825 would picket and shut down the job if WLMC continued to use laborers to operate the forklift with the truss boom attachment.

Walters testified that on April 14, Bunce returned to the Ulster County jobsite and restated that Local 825 would picket and shut down the site for jurisdiction of the truss boom.

Walters testified that on April 15, WLMC received a fax from Local 825 stating that WLMC was not paying the area standards for employees operating power-driven equipment. On the same day, Bunce allegedly gave Walters four options that would avoid a Local 825 picket line. WLMC could: stop using the truss boom; sign a jobsite agreement with Local 825; rent a Local 825 operator from the project's site excavator or any other entity that had an agreement with Local 825; or stop using the truss boom until the Laborers and the Operating Engineers Internationals met and discussed jurisdiction. According to Walters, Bunce never stated that Local 825 would not picket if WLMC paid the laborers the Local 825 area standards wage.

¹ All dates are 1992 unless otherwise indicated.

Bunce testified that he gave Walters two options: either cease using the truss boom attachment, or pay the area standards to whomever operated the machine. Bunce further stated that the picketing was only for area standards.

Also on April 15, Walters met with the general contractor's superintendent. They determined that the setting of the stones delayed the installation of the roof, and therefore they could not postpone the work and wait for Laborers and the Operating Engineers to privately settle their dispute. As a result, Walters decided to proceed with the work using employees represented by Laborers Local 17.

Bunce, who was present at that meeting, then stated that he would commence an area standards picket, which began on the morning of April 16 at both the construction and public gates.² WLMC then replied by fax and letter to Local 825 that it was not required to pay the Local 825 area standards wage.

On April 18, Local 825 sent WLMC an offer for a 3-year contract. WLMC did not respond to this offer. The picketing ceased on April 22.

B. Work in Dispute

The disputed work involves the operation of a forklift fitted with a truss boom, used at the Ulster County Community College jobsite to lift and set in place limestone panels.

C. Contentions of the Parties

The Employer, WLMC, contends that reasonable cause exists to believe that Operating Engineers Local 825 violated Section 8(b)(4)(D) of the Act by threatening to shut down the jobsite if WLMC did not assign the disputed work to Operating Engineers represented by Local 825. WLMC and Local 17 contend that the operation of the forklift with truss boom should be awarded to employees represented by Laborers Local 17 on the basis of the collective-bargaining agreement, employer preference, past practice, industry practice, relative skills and training, and economy and efficiency of operations. Additionally, WLMC seeks a broad order contending that the dispute between the Laborers and the Operating Engineers is longstanding and affects many mason contractors.

The Operating Engineers Local 825 contends that no jurisdictional dispute exists because it only engaged in lawful, area standards picketing. Local 825 argues further that even if a jurisdictional dispute exists, the

Board does not have jurisdiction because both the Laborers and the Operating Engineers have voluntarily agreed to settle their disputes in a private forum which was created by the constitution of the building trades.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(d) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

As discussed above, there is evidence that (1) Bunce stated to Walters that when a truss boom is attached to a forklift, or whenever any power driven equipment is used, the work belongs to operating engineers; (2) Bunce threatened to picket and shut down the jobsite to obtain jurisdiction over the truss boom; (3) Local 825 set up a picket line which had the effect of stopping work; (4) Local 825 contacted WLMC during the picketing to renew an expired contract for forklift work; and (5) Bunce testified that when he set up the pickets he did not know the difference between the wage rates for the Laborers and the Operating Engineers.

Local 825 argues that it did not violate Section 8(b)(4)(D) because it engaged only in lawful area standards picketing. In a 10(k) proceeding, however, the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding a violation. Thus, a conflict in testimony need not be resolved in order for the Board to proceed to a determination of the dispute. *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969).

Under these circumstances, we find that the threat by a representative of Local 825 to shut down the jobsite provides reasonable cause to believe that Local 825 engaged in conduct prohibited by Section 8(b)(4)(D). Even assuming that one object of Local 825 was to protest WLMC's wage rates, we find reasonable cause to believe that another object was to force WLMC to assign the disputed work to operating engineers represented by Local 825. *Electrical Workers IBEW Local 701 (Federal Street Construction)*, 306 NLRB 829 (1992).

Local 825 further argues that this dispute is not properly before the Board because both the Laborers and the Operating Engineers have voluntarily agreed to settle their disputes in a private forum that was created by the constitution of the building trades. No evidence was provided in support of this contention. Even assuming, for the sake of argument, that Local 17 and Local 825 are bound by this agreement, the Board may defer to a private tribunal only when all the parties involved in the dispute have agreed to be bound. *NLRB v. Plasterers Local 79*, 404 U.S. 116 (1971); *Plaster-*

²The full text of the picket signs stated:

NOTICE TO THE PUBLIC. EMPLOYEES
OF WALTERS-LAMBERT

Operating Power Driven Construction Equipment At This Job
Site Are Receiving Less Than Local 825's Area Standard
Wages and Benefits. We Have No Dispute With Any Other
Employer At This Site.

ers Local 502 (*Advanced Terrazzo*), 272 NLRB 810, 811 (1984). During the hearing, Local 825 did not claim that WLMC voluntarily agreed to resolve jurisdictional disputes in a private forum. Thus, there is no basis to find that all the parties have agreed on a method for the voluntary adjustment of this dispute.

Based on the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Collective-bargaining agreements

WLMC Vice President Walters testified that WLMC is a member of the Mason Contractors Association of America (MCAA) which has collective-bargaining agreements with the Bricklayers and Allied Craftsmen, and the Laborers International Unions. In addition, WLMC is a signatory to local agreements with Laborers Local 17 and the Hudson Valley District Council of Bricklayers and Allied Craftsmen. Under section V of the collective-bargaining agreement between the MCAA and the Laborers International Union, the Laborers work jurisdiction includes the tending of masons, unloading, mixing, and the handling of all materials "conveyed by any mode or method."

WLMC is also a signatory to an agreement between Local 17 and the Construction Contractors Association of the Hudson Valley. The preamble of that agreement states that the laborers' work jurisdiction includes supplying materials by motorized units, including forklifts and high forklifts.

WLMC had a single project agreement with Operating Engineers Local 825 that expired on June 30, 1990. That agreement has not been renewed.

We find that Local 17's agreements are broad enough to cover the work in dispute and that the factor of collective-bargaining agreements favors an award of the work in dispute to employees who are represented by Laborers Local 17.

2. Employer preference and past practice

Vice President Walters testified that WLMC prefers to award the work in dispute to employees represented by Laborers Local 17. Between July 5, 1990 and May 4, 1992, WLMC performed masonry work on nine contracts. On all nine contracts, including the Ulster County jobsite, WLMC assigned the operation of the forklift to employees represented by Laborers Local 17. On March 3, pursuant to their collective-bargaining agreement, WLMC and Local 17 entered into a written agreement to perform the disputed work.

Walters stated that WLMC had used operating engineers to operate forklifts for a period of about 5 years during the mid-1980s. Those operating engineers, however, were not represented by Local 825 and the work was not performed in Local 17's geographic jurisdiction.

Thus, we find that the factor of employer preference and past practice favors an award to employees represented by Laborers Local 17.

3. Area and industry practice

Patrick Murphy, vice president of a competing masonry contractor, testified that until 1990 his firm had an agreement with Local 825 and occasionally used operating engineers to operate forklifts. Murphy stated, however, that his firm currently uses laborers to operate forklifts, and that he does not know of any mason contractor within the jurisdiction of Local 17 that currently uses operating engineers to perform such work.

George Miller, executive vice president of the Mason Contractors Association of America (MCAA), testified that the majority of association members prefer using laborers to operate forklifts.

Thus, we find that the factor of area and industry practice favors an award of the work in dispute to the employees represented by Laborers Local 17.

4. Relative skills

Both Walters and Libonati, the business representative for Local 17, testified that Local 17 trains its members to operate forklifts. Walters stated that whenever a truss boom is attached to a forklift, it only takes 5 to 10 minutes for a laborer to become familiar with the controls. Walters conceded that operating engineers are sufficiently skilled to operate forklifts with truss boom attachments, but testified that laborers have more experience working with masons.

Because the record indicates that both the laborers and operating engineers are sufficiently skilled to operate forklifts with truss boom attachments, we find that the factor of relative skill favors neither group of workers.

5. Economy and efficiency of operations

WLMC Vice President Walters testified that laborers are more efficient because they can perform more tasks than operating engineers. At the present time, WLMC does not employ any operating engineers at this jobsite. WLMC contends that operating engineers have numerous work restrictions and would remain idle when not operating the forklifts. Thus, WLMC contends that, even if it hired operating engineers to operate the forklifts, it would still need to employ laborers to assist the masons. Laborers, in addition to operating the forklifts, can mix cement, build scaffolding, and tend to other aspects of the masons' work. Finally, laborers are more familiar with masonry terms and procedures which increases the efficiency of the operation, Walters testified. No evidence was presented showing that operating engineers possess these additional skills or are familiar with masonry terms and procedures.

MCAA Vice President Miller testified that laborers are more economical and efficient because they work as a team with the masons, they better understand masonry work, and are able to assist the masons to complete their work in a safer and more productive manner.

Accordingly, we find that the factor of economy and efficiency of operations favors an award of the work in dispute to the employees represented by Laborers Local 17.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers Local 17 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreement, employer preference and past practice, area and industry practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Laborers Local 17, not to that Union or its members.

Scope of Award

The Employer has requested a broad award, arguing that the dispute between the Laborers and the Operating Engineers is longstanding and affects many mason contractors. Before the Board will issue a broad award, however, it must be shown that: (1) the work in dispute has been a continuous source of controversy in the relevant geographic area and is likely to recur; and (2) the offending union has a proclivity to engage in

"further unlawful conduct" in order to obtain the work in dispute. *Operating Engineers Local 12 (Stief Co. West)*, 306 NLRB 580 (1992). Although it is true that Local 825 was the respondent in an earlier dispute,³ we do not find that earlier conduct sufficient to establish the kind of proclivity to engage in "further unlawful conduct" that might justify the broad order sought. Considering the number of masonry projects in the area,⁴ one jurisdictional award over a 16-year period cannot justify an award reaching beyond the present jobsite. See, e.g., *Iron Workers Local 3 (Spancrete Northeast)*, 267 NLRB 950, 953 (1983).

Accordingly, the Employer's request for a broad order is denied. The present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determinations:

1. Employees of Walters and Lambert Mason Contractors, Inc. represented by Laborers International Union of North America, Local No. 17 are entitled to perform the disputed work of operating the forklift fitted with a boom truss attachment at the Ulster County Community College jobsite in New Paltz, New York, for Walters and Lambert Mason Contractors, Inc.

2. International Union of Operating Engineers Local 825, A,B,C,D,R,RH is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Walters and Lambert Mason Contractors, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Operating Engineers Local 825 shall notify the Regional Director for Region 3 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with this determination.

³ *Operating Engineers Local 825-A (Iacono Construction)*, 227 NLRB 110 (1976).

⁴ WLMC has used forklifts on nine contracts in the past 2 years. A competing mason contractor used forklifts on 16 contracts in the past 4 years.